DATUK (DATU) AMIR KAHAR BIN TUN DATU HAJI MUSTAPHA

v.

TUN MOHD SAID BIN KERUAK & 8 ORS.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' HJ. ABDUL KADIR SULAIMAN J.
[ORIGINATING SUMMONS NO. K. 24-63 OF 1994]
24 NOVEMBER 1994

***CONSTITUTIONAL LAW**: Resignation of Chief Minister of Sabah - Whether amounted to resignation of the whole Cabinet - Whether other members of the Cabinet were deemed to have vacated their offices - Constitution of Sabah, Arts. 6(3), 7(1),(2), 10(2)(b).*

***CONSTITUTIONAL LAW**: Constitution of Sabah - Evidence of Chief Minister ceasing to command the confidence of the majority members of the Legislative Assembly - Whether determinable only by way of motion in the Legislative Assembly - Whether also availabe from other extraneous sources.*

***WORDS AND PHRASES**: "to command the confidence of a majority of the members of the Assembly" - Articles 6(3) & 7(1) State Constitution of Sabah.*

On 21 February 1994, following a State election in Sabah, the 1st defendant, the Yang di-Pertua Negeri of Sabah, appointed one Datuk Pairin as the Chief Minister of Sabah. Datuk Pairin was the leader of PBS, the party that won the election. Consequently other elected members from PBS, including the plaintfiff, were appointed to the Cabinet and by that, the plaintiff was made a State Minister.

On 16 March 1994, there was a mass exodus of PBS assemblymen to BN, the opposition party. This turn of event had reversed the majority position in the Assembly vis-a-vis the two parties, as the BN, by then, had 33 seats as against 21 held by PBS. On 17 March 1994, following established convention, Datuk Pairin tendered his resignation as Chief Minister. The plaintiff however did not tender his resignation. On that same day the BN formed a new government in Sabah and the 1st defendant, in accordance with constitutional requirements, duly appointed the 2nd defendant, the leader of BN, as the new Chief Minister. The 3rd to the 9th defendants were later appointed to the new Cabinet.

The plaintiff challenged the legality of the new Government and sought for a declaration that the resignation of Datuk Pairin, being personal in nature, had not affected his Cabinet and hence, the plaintiff's own position as a duly appointed State Minister. The primary issue that arose was whether the resignation of Datuk Pairin herein was constitutionally proper and effective, and if so, whether that resignation in law amounted to the resignation of his whole Cabinet.

Held:

[1] Article 7(1) of the Constitution in effect requires the Chief Minister to tender the resignation of the members of his Cabinet, including himself, if he ceases to command the confidence of a majority of the members of the Legislative Assembly. Thus once a Chief Minister in fact knows that he has lost that confidence, he should not wait for a vote of confidence to be formally tabled in the Assembly but should immediately take the honourable way out by tendering the resignation of his Cabinet. However, even if the Chief Minister, under those circumstances, refuses or does not tender the resignation of the members of the Cabinet, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the

confidence of a majority of the members of the Assembly. This is not only the effect of Art. 7(1) but also the established convention. Therefore, notwithstanding that Datuk Pairin's resignation letter herein was silent as to the resignation of the other members of his Cabinet, the resignation was in fact a resignation of the whole members of his Cabinet, including the plaintiff, by virtue of Art. 7(1) of the State Constitution. And on the acceptance by the 1st defendant of that resignation, the whole Cabinet of Datuk Pairin collapsed.

[2] The evidence that a Chief Minister ceases to command the confidence of the majority members of the Assembly for the purpose of Art. 7(1) of the Constitution is not only available from the votes taken in the Assembly. There is nothing in the Constitution which can be construed as requiring that the test of confidence must be by a vote taken in the Assembly itself. That fact can also be evidenced by other extraneous sources, including through the knowledge of the Chief Minister himself from the surrounding circumstances as testified by this case. Here, that extraneous source is to be found in the clear expression contained in the petition by the 30 assemblymen to the 1st defendant and the admission of that fact by Datuk Pairin. This clear expression suffices for the 1st defendant to exercise his discretion under Art. 6(3) to appoint the 2nd defendant as the new Chief Minister.

Therefore the appointment of the 2nd defendant as the new Chief Minister on 17 March 1994 was valid and constitutional.

[3] The appointments of the 3rd to the 9th defendants on 24 March 1994 was in accordance with the provisions of Art. 6(3) of the Constitution and were therefore valid. The contention that for their appointment to be legal and constitutional, the 1st defendant must first revoke the appointment of the other members of Datuk Pairin's Cabinet, and that the 2nd defendant ought to have advised the 1st defendant to undertake such revocation, is not sustainable. If there need to be a revocation of the appointment at all under Art. 7(2) of the Constitution, the proper Chief Minister to tender the advice to the 1st defendant must be the Chief Minister of the Cabinet of which these other members are appointed as such, for it was this Chief Minister who brought those members into his Cabinet pursuant to Art. 6 of the Constitution. If this Chief Minister himself ceases to hold office, as is the case here, then the new Chief Minister has no power to advise the 1st defendant for their removal unless, before the intended advice, those members were re-appointed to the Cabinet of this new Chief Minister whereby pursuant to the re-appointment. This however did not happen.

[Application dismissed]

Cases referred to:
Adegbenro v. Akintola [1963] 3 WLR 63 ***(foll)***
Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli [1966] 2 MLJ 187 ***(dist)***

Other sources referred to:
Indian Constitutional Law, 4th Ed. p. 87 by M.P. Jain

For the plaintiff - Y.M. Raja Aziz Addruse (Yunof E. Maringking with him); M/s Maringking & Co.
For 1st, 2nd, 4th, to 9th defendants - Abdul Ghani Patail, SFC (K.K. Wong, and Halimah Nawab with him).

JUDGMENT

Hj. Abdul Kadir Sulaiman J.:
On 18 and 19 February 1994 there was a state election held in Sabah to elect 48 members to the Legislative Assembly as provided for under Article 14(2) of the Constitution of the State of Sabah. However, by virtue of Article 14(1)(c) the Sabah Legislative Assembly shall consist also

of not more than six other nominated members. Members of two major political parties, the Parti Bersatu Sabah (hereinafter referred to as "the PBS") under the leadership of Datuk Joseph Pairin Kitingan and the State Barisan Nasional (hereinafter referred to as "the BN") under the leadership of Tan Sri Haji Sakaran Dandai, the 2nd defendant, contested in the said election. The plaintiff belonged to the PBS, and all three of them contested in the election and won. When the result of the election was announced the PBS won 25 of the total elected seats as against the BN which managed to obtain the 23 remaining seats. So, PBS obtained a majority of the members in the Legislative Assembly by 2 elected seats. As the leader of the party that had won a majority of the elected seats and a member of the Assembly, Datuk Pairin was on 21 February 1994 duly appointed by the Yang di-Pertua Negeri, the 1st defendant, as the Chief Minister of Sabah and on his advice, other elected members from the PBS, including the plaintiff, were appointed in accordance with Article 6(3) of the Constitution to form the State Cabinet. For the purpose of Article 14(1)(c) of the Constitution, the Sabah Legislative Assembly also has 6 nominated members appointed. Thus for the purpose of Article 14 the Sabah Legislative Assembly consists of 54 members in all, both elected and nominated. In accordance with Article 9(1) of the Constitution the plaintiff was one of the Ministers and was assigned the portfolio of Deputy Chief Minister and Minister of Agriculture and Fisheries.

On 17 March 1994, Datuk Pairin tendered his resignation as the Chief Minister of Sabah but he did not tender the resignation of the other members of his Cabinet. On the same day the Yang di-Pertua Negeri, the 1st defendant appointed the 2nd defendant as the new Chief Minister to replace Datuk Pairin. On 24 March 1994, the 1st defendant on the advice of 2nd defendant, appointed the 3rd to the 9th defendants as other members of the Cabinet of the 2nd defendant. Until this time, the other members of the previous Cabinet under Datuk Pairin did not tender their resignation and neither were their appointments revoked by the Yang di-Pertua Negeri.

By an amended originating summons, the plaintiff sought the following declarations:

1. A declaration that since no motion was ever tabled in the State Assembly against Datuk Joseph Pairin Kitingan so as to determine whether or not he had lost confidence of majority of the members of the Legislative Assembly for the purpose of Article 7(1) of the State Constitution of Sabah (the State Constitution) the resignation of Datuk Joseph Pairin Kitingan on 17 March 1994 was personal to him as a Member of the State Cabinet under Article 7(2) of the State Constitution and has no effect on the appointment of the plaintiff as a Deputy Chief Minister and Minister of Agriculture and Fisheries.

2. A declaration that the 1st defendant at the Head of the State of Sabah acted *ultra vires* the provisions of the State Constitution by purportedly appointing the 3rd to 9th defendants as Members of the Sabah State Cabinet on 24 March 1994 when at all material times the appointments of the plaintiff and the other Cabinet Members who were earlier appointed on 21 February 1994 under Article 6(2) of the State Constitution had not been revoked nor had they resigned.

3. A declaration that the appointment of the plaintiff as a Member of the State Cabinet by the 1st defendant under an instrument dated 21 February 1994 had not been legally revoked and still subsist in law and hence the plaintiff is still a member of the Sabah State Cabinet under the Chief Ministership of the 2nd defendant and assigned to the portfolio of Deputy Chief Minister and Minister of Agriculture and Fisheries and is legally entitled to receive emolument and/or allowances.

4. Alternatively, a declaration that the appointments of the 2nd to 9th defendants are invalid because the 1st defendant acted *ultra vires* the State Constitution by relying upon the purported petition signed by 30 Assemblymen outside the Legislative Assembly.

However, on the date of hearing of this application the learned Counsel for the plaintiff formally abandoned prayer (4) above leaving the plaintiff with only the first three prayers. Therefore, the appointment of the 2nd defendant by the 1st defendant on 17 March 1994 is no longer in issue, and was, therefore, accepted as being validly made.

For the plaintiff there is his affidavit in support of this application, affirmed on 20 May 1994 and one other affidavit affirmed by Datuk Joseph Pairin Kitingan on 9 July 1994. For the defendants, eleven affidavits in reply were filed. The facts in this case are not seriously in dispute. The affidavit of Datuk Pairin for the plaintiff discloses that on 19 February 1994, the Sabah State Election results were announced in that 25 seats were won by the PBS and 23 seats by the BN. Subsequently he was appointed as the Chief Minister of Sabah and on the same day other Ministers, including the plaintiff, were appointed to form the Cabinet. On 13 March 1994 because of three defections by Assemblymen from the PBS to the BN, he requested the 1st defendant for the dissolution of the Assembly so as to call for a fresh mandate from the people. However the consent to his request was withheld by the 1st defendant. Then on 16 March 1994 he saw "as announced through RTM so called petition with signatures purported to be those of the members of the Legislative Assembly". On 17 March 1994 he resigned as the Chief Minister but he did not tender the resignation of the other Cabinet members because the ground for his resignation was personal to him and on the same day the 1st defendant appointed the 2nd defendant as the Chief Minister of Sabah. On 24 May 1994 "the new Cabinet was appointed but the old cabinet's appointments were never revoked." Finally he states that his intention was to resign from the post of Chief Minister only without involving the other members of the Cabinet as was clearly stated in his press statement when he announced his resignation.

The affidavit in support of the plaintiff discloses that on 21 February 1994, the 1st defendant appointed Datuk Pairin as the Chief Minister of Sabah. On the advice of Datuk Pairin, the 1st defendant on the same day, appointed the plaintiff together with seven others as members of the Cabinet, and assigned the plaintiff to the portfolio of Deputy Chief Minister and Minister of Agriculture and Fisheries. On 16 March 1994, pursuant to defections of assemblymen from the PBS to the BN, 30 members sent a petition to the 1st defendant demanding the resignation of Datuk Pairin as the Chief Minister of Sabah and on 17 March 1994 Datuk Pairin resigned as the Chief Minister. The plaintiff, however, did not tender his resignation. On the same day the 1st defendant appointed the 2nd defendant as the new Chief Minister. However, on 24 March 1994, on the advice of the 2nd defendant, the 1st defendant appointed the 3rd to the 9th defendants as Ministers in the Cabinet of the 2nd defendant without revoking the appointment of the plaintiff and his colleagues in the previous Cabinet. The plaintiff contends that the resignation of Datuk Pairin on 17 March 1994 was personal to him and therefore, it does not affect the status of the other members of his Cabinet, including him, for there was no motion tabled in the Legislative Assembly to determine whether or not the former Chief Minister had ceased to command the confidence of a majority of the members of the Assembly. Consequently, the appointments of the 3rd to the 9th defendants on 24 March 1994 was *ultra vires* the Sabah Constitution.

For the defendants, the affidavit in reply no. 4 affirmed by the 1st defendant on 7 September 1994 reveals that on 13 March 1994 Datuk Pairin requested him to dissolve the State Legislative Assembly but he withheld consent to the request in exercise of his personal discretion under Article

10(2)(b) of the Constitution. Article 10(2)(b) states that the Yang di-Pertua Negeri may act in his discretion in the performance of the appointment of a Chief Minister and the withholding of consent to a request for the dissolution of the Legislative Assembly. Then on 16 March 1994 his office received a petition signed by 30 members of the Legislative Assembly, *inter alia*, declaring that they no longer have any confidence in nor will give any support to Datuk Pairin as Chief Minister and requested to procure the resignation of Datuk Pairin as Chief Minister. The petition also requested that in the event Datuk Pairin refused to either resign or subject himself to a test of confidence, the 1st defendant is to invite the 2nd defendant to form a new government The aforesaid petition is exhibited as "TYT4" and the content is as follows:

Tuan Yang Terutama, Tarikh: 16 Mac 1994
Tun Haji Said Bin Keruak
d/a Istana
Kota Kinabalu
Sabah

Tuan Yang Terutama Tun,

1. Kami selaku Ahli-Ahli Dewan Undangan Negeri (ADUN) Sabah yang baru dipilih dan sebagai penyokong Barisan Nasional dengan hormatnya memaklumkan kepada Tun bahawa kami tidak lagi mempunyai kepercayaan kepada Datuk Seri Joseph Pairin Kitingan dan kami tidak akan menyokong Datuk Seri Joseph Pairin Kitingan, Pemimpin Parti Bersatu Sabah sebagai Ketua Menteri Sabah.

2. Kami juga memohon memaklumkan Tun bahawa Barisan Nasional dan penyokong-penyokongnya sekarang menguasai majoriti di kalangan Ahli-Ahli Dewan Undangan Negeri.

3. Oleh itu dengan segala hormatnya kami ingin menegaskan bahawa Datuk Seri Joseph Pairin Kitingan atau pemimpin-pemimpin dan parti-parti politik atau campuran parti-parti politik yang lain tidak berkemampuan mendapat suara majoriti dalam Dewan Undangan Negeri tersebut.

4. Dalam keadaan yang demikian kami memohon jasa baik Tun untuk, samada, mendapatkan perletakan jawatan Datuk Seri Joseph Pairin Kitingan selaku Ketua Menteri Sabah atau untuk membantu mengadakan suatu persidangan Dewan Undangan Negeri dengan segera dan mengarahkan Datuk Seri Joseph Pairin Kitingan untuk menghadapi suatu undi kepercayaan.

5. Jika Datuk Seri Joseph Pairin Kitingan enggan mematuhi salah satu arahan tersebut, kami dengan hormatnya memohon Tun melucutkan mandat beliau dan menjemput Tan Sri Haji Sakaran Dandai untuk membentuk sebuah Kerajaan yang baru.

6. Kami dengan hormatnya juga ingin merakamkan di sini perasaan penghargaan kami yang tidak terhingga di atas kepimpinan bijaksana dan ketabahan Tun dalam mempertahankan Perlembagaan.

Yang Ikhlas

(A list of 30 names with signatures)

The said affidavit in reply goes on to state that on 17 March 1994, Datuk Pairin by a letter addressed to him tendered his resignation as the Chief Minister which resignation he accepted in exercise of his personal discretion under Article 7(1) of the Constitution. He considered the resignation as a resignation of the whole Cabinet under the said Article or in accordance with established constitutional convention, usage and practice. Upon the said resignation, all other members of the Cabinet have ceased to hold office at his pleasure under Article 7(3) of the Constitution. The resignation letter is exhibited as “TYr-5” and the content is as follows:

17 Mac 1994

Tuan Yang Terutama
Yang DiPertua Negeri Sabah
Istana
Kota Kinabalu

Kehadapan Majlis Tuan Yang Terutama

Yang DiPertua Negeri Sabah,

Per: Perletakan Jawatan Sebagai Ketua Menteri Sabah

Dengan segala hormat dan takzimnya, izinkanlah saya menyampaikan hasrat dan tujuan saya meletakkan jawatan sebagai Ketua Menteri Negeri Sabah mulai dari jam 2.00 petang 17 Mac 1994.

Saya juga ingin mengucapkan setinggi-tinggi penghargaan di atas kepercayaan Tuan Yang Terutama Yang DiPertua Negeri Sabah kepada saya sebagai Ketua Menteri Negeri Sabah selama ini.

Sekian, terima kasih.

Yang benar,

tt

(Datuk Joseph Pairin Kitingan)

On the same day he, the 1st defendant, appointed and swore in the 2nd defendant as the new Chief Minister and called upon him to form the government in the exercise of his personal discretion under Article 6(3) read together with Article 10(2)(a) of the Constitution. The instrument of appointment of the 2nd defendant as the new Chief Minister is exhibited as "SS-13" to the affidavit in reply no. 3 affirmed on 21 July 1994 by Shee Hoa Sern @ Stephen, the Ketua Penolong Setiausaha (Kabinet dan Perlembagaan) of the Jabatan Ketua Menteri, Kota Kinabalu, Sabah, and published in Warta Kerajaan Sabah on 31 March 1994 as Gazette Notification No. 281. Then, on 24 March 1994 on the advice of the 2nd defendant as the new Chief Minister, pursuant to article 6(3) of the Constitution the 1st defendant appointed and swore in the 3rd to the 9th defendants. Their instruments of appointment are exhibited as "TYT-6" to "TYT-12" and published in Warta Kerajaan Sabah on 28 April 1994 as Gazette Notification No. 281.

Affidavit in reply No. 2 of the defendants affirmed on 18 June 1994 by Lucy Yong @ Yong Nyen Ching, the Acting Press Secretary to the former Chief Minister, Datuk Pairin, reveals that her duties included the preparing of speeches and press statements for Datuk Pairin and arranging for press conferences for him. On 16 March 1994 at about 11.30 p.m. Datuk Pairin dictated to her a one-page press statement to be finalised for him to deliver at a press conference on 17 March 1994 in connection with his resignation as the Chief Minister of Sabah. She accordingly finalised the press statement in English and Bahasa Malaysia. Both are exhibited as "LY-1" as follows:

The English version:

The Right Honourable Datuk Joseph Pairin Kitingan's Message Following his Resignation as the Chief Minister of Sabah on 17 March 1994

Events in the last few days have forced a situation where we must tread carefully to avoid a further deterioration of the political situation. The turn of events have brought about a situation much different from that of 21 February 1994 when I was sworn in as the Chief Minister of Sabah after the Parti Bersatu Sabah had won 25 seats. With the appointment of the six nominated Assemblymen the total was brought to 31 seats. The situation is now reversed with the Barisan Nasional having the majority of 33 seats to PBS's 21 thus paving the way for it to form the next government.

By convention, the Chief Minister will have to resign if the ruling party no longer has the majority support of the Assemblymen. Under the present circumstances, where the PBS majority is greatly reduced with the mass exodus of its Assemblymen to the BN, my position as Chief Minister is no longer tenable. Having taken all matters into consideration, I have, therefore, decided to resign from the post of Chief Minister.

It is a sad decision for me but nonetheless I truly feel this is the most honourable thing to do under the present circumstances. I would like to take this opportunity to thank each and everyone of you for your full support to ensure Parti Bersatu Sabah's victory in the just concluded state elections. We truly appreciated your mandate to give us another chance to govern the state.

In the context of what has transpired over the last few days, it is clear that some changes have occurred that tipped the balance of support in favour of the BN. I am now acknowledging the need to respond honourably to the situation. I made this decision to resign with a clear conscience and in the knowledge that I had tried to do my best for the people and the state in the past nine years.

As I offer my thanks and appreciation to the people of Sabah for giving us their trust and confidence, I would also like to take this opportunity to congratulate the new Chief Minister and his government which will be formed today. It is my hope too that the new government will continue to look after the interests of the people and the state and world to ensure a developed, progressive and just society.

I would also like to assure the new Chief Minister and his government that I will cooperate and do my part to serve the people and the state. I sincerely wish him all the best.

The Bahasa Malaysia Version:

Kenyataan YAB Datuk Joseph Pairin Kitingan Berikutan Perletakan Jawatan Beliau sebagai Ketua Menteri Sabah pada 17 Mac 1994

Peristiwa-peristiwa yang berlaku sejak akhir-akhir ini, telah mewujudkan satu keadaan di mana kita mestilah mengambil langkah-langkah yang berhati-hati bagi mengelakkan keadaan politik daripada menjadi bertambah buruk. Peristiwa-peristiwa yang berlaku ini amat berbeza sekali dengan peristiwa-peristiwa yang berlaku pada 21 Februari 1994 semasa saya mengangkat sumpah sebagai Ketua Menteri Sabah setelah Parti Bersatu Sabah memenangi 25 kerusi. Dengan perlantikan 6 orang Ahli Dewan yang dilantik, maka Parti Bersatu Sabah mempunyai 31 kerusi. Bagaimanapun keadaan sekarang telah menjadi sebaliknya di mana Barisan Nasional kini mempunyai majoriti 33 kerusi berbanding dengan PBS yang mempunyai 21 kerusi dan dengan itu telah membolehkannya untuk membentuk Kerajaan.

Mengikut peraturan, Ketua Menteri haruslah meletakkan jawatannya sekiranya parti yang memerintah tidak lagi mendapat sokongan majoriti Ahli-Ahli Dewan. Dalam keadaan sekarang di mana majoriti PBS telah berkurangan dengan keluarnya beramai-ramai Ahli-Ahli Dewan PBS menyertai BN, maka saya tidaklah lagi boleh menjadi Ketua Menteri. Setelah mempertimbangkan semua perkara maka saya dengan ini memutuskan untuk meletakkan jawatan saya sebagai Ketua Menteri.

Ini adalah satu keputusan yang amat sedih sekali bagi saya, tetapi saya benar-benar merasakan bahawa ini adalah satu tindakan yang wajar datam keadaan sekarang. Saya ingin mengambil kesempatan ini untuk menyampaikan setinggi-tinggi rasa penghargaan dan terima kasih kepada semua pihak yang telah memberikan sokongan padu bagi memberikan kemenangan kepada Parti Bersatu Sabah dalam Pilihanraya Umum Negeri yang baru sahaja selesai. Kami sangat-sangat menghargai mandat yang telah memberikan kami peluang sekali lagi untuk mentadbir negeri ini.

Melihat kepada peristiwa-peristiwa yang berlaku sejak akhir-akhir ini, maka jelaslah bahawa beberapa perubahan telah menyebabkan sokongan beralih kepada BN. Saya menyedari akan

keadaan yang berlaku dan dengan ini saya mengambil keputusan untuk meletakkan jawatan dan di atas kesedaran bahawa saya telah berusaha dengan sedaya upaya untuk rakyat dan negeri ini selama sembilan tahun yang lalu.

Dalam menyampaikan penghargaan dan terima kasih saya kepada seluruh rakyat di negeri Sabah yang telah memberikan sepenuh kepercayaan dan keyakinan kepada kami, saya juga ingin mengambil kesempatan ini untuk mengucapkan tahniah kepada Ketua Menteri yang baru dan Kerajaan yang akan dibentuk pada hari ini. Saya juga berharap semoga Kerajaan yang baru akan terus memelihara dan melindungi kepentingan rakyat dan negeri Sabah dan berusaha untuk membentuk sebuah masyarakat yang membangun, progresif dan adil.

Akhir sekali saya ingin memberikan jaminan kepada Ketua Menteri yang baru dan Kerajaannya bahawa saya akan memberikan kerjasama dan memainkan peranan saya dalam memberikan perkhidmatan kepada rakyat dan negeri Sabah. Dengan rasa yang setulus ikhlasnya, saya mengucapkan selamat maju jaya.

This affidavit in reply no. 2 further reveals that at the material time Datuk Pairin also directed her to arrange for a press conference at his official residence to be held on 17 March 1994 at about 2.00 p.m. The deponent was present at the appointed press conference attended by journalists from the local, national and international news and mass media. At the conference, Datuk Pairin read out the Bahasa Malaysia version of the press statement and copies thereof in English and Bahasa were distributed to the journalists present. The conference lasted about one hour. The news of Datuk Pairin's resignation as announced at the press conference was widely reported in all the local and national newspapers including the Daily Express and The New Straits Times. A copy each of the said news item published on 18 March 1984 is exhibited respectively as "LY-2" and "LY-3".

Affidavit in reply no. 1 of the defendants affirmed on 18 June 1994 by Shee Hoa Sern @ Stephen, the Ketua Penolong Setiausaha (Kabinet dan Perlembagaan) of the Jabatan Ketua Menteri, Kota Kinabalu, Sabah reveals that on 11 May 1994 it was published in Borneo Mail the clarification by Datuk Pairin concerning his resignation, which is exhibited as "SS-12". The heading of exhibit"SS-12" is "Pairin Explains". *Inter alia*, it states:

He (the plaintiff claimed Pairin had resigned individually and voluntarily without involving his other ministers. Amir Kahar said he intended to take his case to Court. And Pairin yesterday attested to this saying he resigned on his own as head of the government and that his letter of resignation dated March 17 to the Head of State Tun Haji Mohd Said Keruak (the 1st defendant) did not involve his other ministers.

He said he made the decision to resign following convention that he did not command the majority support of the assemblymen, including his own, some of whom had defected to Barisan National or formed their own parties.

"The act of tendering my resignation may have been interpreted to have meant that the whole Cabinet must resign. That was my interpretation and that of some others too but many others interpreted it in a different light.

I can't help what they are thinking or say what is the real interpretation."

He said while he was talking about following convention others were asking the legal question. "I am now in doubt", he declared.

Pairin said if the matter were to be viewed from the legal point of view, then it would be a question of looking at the State Constitution.

Towards this end he pointed out that he was not questioning anything but that his ministers are, and that he would leave it to them to pursue the matter.

From the evidence revealed in the various affidavits filed both for the plaintiff and for the defendants, it appears that by 13 March 1994, 3 of the members of the Assembly from the PBS crossed over to the BN thereby reversing the original majority between the PBS and the BN, giving the BN 26 seats as against the PBS 22 seats of the total 48 elected seats in the Sabah Legislative Assembly. Facing the reality of the situation, to my mind, led Datuk Pairin on 13 March 1994 to request the 1st defendant to dissolve the Assembly and as he stated it in his affidavit "so as to call for a fresh mandate from the people..". He must has felt that the confidence of the members of the Assembly in him as the Chief Minister was no longer secured. However, the 1st defendant withheld the consent to his request. According to Article 10(2) of the Constitution this power to withhold the consent is a power exercisable personally according to his subjective judgment and is therefore, nonjusticiable. Then on 16 March 1994, the 1st defendant received a petition signed by 30 persons exhibited as "TYT-4" who claimed to be members of the Legislative Assembly representing the BN alleging that they no longer had the confidence in and would no longer support Datuk Pairin as the Chief Minister of Sabah. They also informed the 1st defendant that the BN and its supporters now controlled the majority of members in the Assembly and that Datuk Pairin or other leaders or parties was incapable of obtaining a majority voice in the Assembly. In the circumstances they requested the 1st defendant to get Datuk Pairin to tender his resignation as the Chief Minister or for the 1st defendant to convene the meeting of the Assembly and to direct Datuk Pairin to face a vote of confidence. The petition further requested the 1st defendant that in the event that Datuk Pairin refused to comply with any of the said directions, he was to withdraw the mandate given to Datuk Pairin and to invite the 2nd defendant to form a new government. This petition, on the same day, was screened over the RTM and Datuk Pairin saw it. Then that same night at about 11.30 p.m. Datuk Pairin got the exhibit "LY-1" prepared by his Acting Press Secretary with instruction to arrange for a press conference to be held the following day at about 2.00 p.m. which according to the said Secretary was duly held and attended by journalists both from local and foreign media where copies both in the English and the Bahasa Malaysia versions were distributed to those present. In the meanwhile before the said press conference, Datuk Pairin tendered his resignation letter to the 1st defendant which is exhibited as "TYT-S" to the affidavit in reply no. 4 of the defendants. The text of the press statement of Datuk Pairin mentioned, *inter alia*, that the turn of events has reversed with the BN having the majority of 33 seats to PBS's 21 thus paving the way for the BN to form the next government. It is to be noted here that the 33 seats of the BN mentioned by Datuk Pairin must have included the 6 seats occupied by the nominated members appointed pursuant to Article 14 of the Constitution. Thus in respect of the elected seats, the BN would have only 27 seats. In any event, Datuk Pairin had acknowledged that the BN was in the majority in the proportion of 27:21. Quoting the convention, the statement went on to say that by it the Chief Minister will have to resign if the ruling party no longer has the majority support of the Assemblymen. By that I take it to mean that Datuk Pairin must have been satisfied that the confidence of a majority of the members of the Legislative Assembly was no more with him as otherwise in his press statement he would not have said that the changes that occurred had tipped the balance of support in favour of the BN and to congratulate the new Chief Minister and his government which he knew would be formed that day. No doubt he uses the word "support" as against the term "confidence" used in the Article. The term "confidence" is not defined in the Constitution and neither is the word "support" found in it. In my view the difference in the meaning of the two words is not real and substantial but merely a matter of saying the same thing in a different way. When someone has no confidence in another, he is in effect not in support of that other in the sense that he no longer has the trust in that other. When one support the other he will vote for that other on any issue, just as when he has the confidence in that other, he will vote for that other on any similar issue.

The said press statement of Datuk Pairin goes on to state; "Under the present circumstances, where the PBS majority is greatly reduced with the mass exodus of its Assemblymen to the BN, my position as Chief Minister is no longer tenable. Having taken all matters into consideration, I have, therefore, decided to resign from the post of Chief Minister." No doubt in the view of Datuk Pairin in the light of the circumstances his position as the Chief Minister is no longer tenable. But what about the position of the other members of his Cabinet? Article 7(1) of the Constitution provides that in the circumstances he is required to tender the resignation of the member of the Cabinet which is made up of himself as the Chief Minister and the other members who are styled as "Ministers" See Article 6(2). Therefore, the mere fact that Datuk Pairin chose to tender the resignation of the Chief Minister only would not make the other members to remain in office. The resignation of Datuk Pairin in the circumstances, is a resignation of the whole members of his Cabinet including the plaintiff. It follows that the issue of resignation and the revocation of the appointment of other members would no longer arise. The intention behind the requirement in Article 7(1) for a Chief Minister to tender the resignation of the members of the Cabinet is, in my view, to enable a new Cabinet to be formed pursuant to Article 6 of the Constitution. Articles 6 and 7 of the Constitution state:

6. (1) There shall be a State Cabinet to advise the Yang di-Pertua Negeri in the exercise of his functions.

(2) The Cabinet shall consist of a Chief Minister, and not more than eight nor less than four other members, (to be styled "Ministers") appointed in accordance with clause (3).

(3) The Yang di-Pertua Negeri shall appoint as Chief Minister a member of the Legislative Assembly who in his judgment is likely to command the confidence of a majority of the members of the Assembly and shall appoint the other members mentioned in clause (2) in accordance with the advice of the Chief Minister from among the members of the Assembly:

Provided that if an appointment is made while the Legislative Assembly is dissolved a person who was a member of the last Assembly may be appointed but shall not continue to hold once after the first sitting of the next Legislative Assembly unless he is a member thereof.

(4) Notwithstanding anything in this Article, a person who is a citizen by naturalisation shall not be appointed Chief Minister.

(5) The Chief Minister shall not hold any office of profit and shall not actively engage in any commercial enterprise.

(6) The Cabinet shall be collectively responsible to the Legislative Assembly.

(7) For the purpose of Clause (3) of this Article, where a political party has won a majority of the elected seats of the Legislative Assembly in a general election, the leader of such political party, who is a member of the Legislative Assembly, shall be the member of the Legislative Assembly who is likely to command the confidence of the majority of the members of the Assembly.

7. (1) If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet.

(2) A member of the Cabinet may at any time resign his office by writing under his hand addressed to the Yang di-Pertua Negeri, and a member of the Cabinet other than the Chief Minister shall also vacate his office if his appointment thereto is revoked by the Yang di-Pertua Negeri acting in accordance with the advice of the Chief Minister.

(3) Subject to clauses (1) and (2), a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri.

Article 7(1) envisages a situation where if the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, unless the Assembly is dissolved, the

Cabinet shall be dissolved thus opening the way for a new Cabinet to be formed. This new Cabinet can comprise of members from the same party or otherwise, provided that the person to be appointed as the new Chief Minister to head this new Cabinet is, in the judgment of the Yang di-Pertua Negeri, likely to command the confidence of a majority of the members of the Assembly. See Article 6(3) of the Constitution. The dissolution of the existing Cabinet under Article 7 does not involve the Yang di-Pertua Negeri or necessarily, the members of the Legislative Assembly. The Article merely requires the Chief Minister to tender the resignation of the members of his Cabinet if he ceases to command the confidence of a majority of the members of the Legislative Assembly. To hold otherwise, in instances where a Chief Minister who in fact knows that he has ceased to command the confidence of a majority of the members of the Assembly cannot resign but to wait for the Assembly to be summoned and then for the Assembly to vote on the confidence would, in my view, create a legal absurdity and would result in a ludicrous situation. As the learned Counsel for the defendants puts it, this situation is definitely against the democratic principle upon which the Constitution and government is based. Thus, once a Chief Minister in fact knows that he has lost the confidence of a majority of the members of the Assembly, he should not wait for a vote of confidence to be normally tabled in the Assembly but should immediately take the honourable way out by tendering the resignation of his Cabinet. Under the circumstances, if the Chief Minister refuses or does not tender the resignation of the members of the Cabinet which includes himself, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the confidence of a majority of the members of the Assembly and it is not necessary, therefore, for the Yang di-Pertua Negeri as a last resort to remove the Chief Minister and the other members of his Cabinet. This is not only the effect of Article 7 of the Constitution but it is the established convention. See page 73 of *Adegbenro v. Akintola* [1963] 3 WLR 63 in regard to the established convention. The fact of a Chief Minister ceasing to command the confidence of a majority of the members of the Assembly can be evidenced by various situations and circumstances. It can be through the knowledge of the Chief Minister himself from the surrounding circumstances or it can be through the actual voting in the Assembly by its members. The lists are not by any means exhaustive. There is no where in the Constitution to say that the only evidence of such fact must be through the actual vote in the Assembly.

It follows therefore, that if the Chief Minister does not tender the resignation of the other members of his Cabinet wherein the Cabinet is to be treated as dissolved under the circumstances envisaged by Article 7(1) of the Constitution, their offices are deemed to have been vacated. By formality, the Chief Minister is required to tender the resignation of the Cabinet but if he chooses to tender only his resignation, the other members of his Cabinet cannot say that they retain the office because the Chief Minister does not tender their resignation. The blame, if any, lies upon the Chief Minister for not complying with the requirements of Article 7(1) .

But the learned Counsel for the plaintiff contends otherwise. He submits that the test of confidence for purpose of Article 7(1) must be through a motion to be tabled before the Legislative Assembly and to be voted upon by members of the Assembly and cannot be deduced from other extraneous circumstances. In support of his contention, he quoted *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187. His Lordship in that case declined to follow the decision of the Privy Council in *Adegbenro v. Akintola* (*supra*) when he says at page 193:

> In my view the Privy Council's judgment relating to the Constitution of Nigeria does not apply to the Constitution of Sarawak because of the following distinguishing features and circumstances:
>
> (1) In the Nigerian case it was mathematically beyond question that more than half of the House no longer supported the Premier.

(2) The measurement in Nigeria was a measurement of 'support', not 'confidence'. The Sarawak Constitution is dated subsequent to the decision of Adegbenro v. Akintola and it does seem to me that the 'confidence of a majority of members, being a term of art, may imply reference to a vote such as a vote of confidence or a vote on a major issue.

(3) In Nigeria it was not disputed that the Governor had express power to remove the Premier from office if he no longer commanded support.

(4) In Nigeria the Governor had express power to assess the situation "as it appeared to him".

(5) In Nigeria all Ministers, including the Premier, held office "during the Governor's pleasure"; although there was an important proviso to this.

All the above five points were peculiar to Nigeria, and not one of them applies to Sarawak. These distinguishing features force me in the present case to a conclusion converse to the Privy Council decision. It seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negeri. Men who put their names to a 'Top Secret' letter may well hesitate to vote publicly in support of their private views.

So it is clear that the reasons for his Lordship differing in his view from the decision of the Privy Council in *Adegbenro v. Akintola* (*supra*) was because of the five distinguishing features and circumstances appearing in that case. As to the first distinguishing feature and circumstance, it does not happen in the present case. In this case the feature and circumstance are the same as that found in the Nigerian case in that it was mathematically beyond question that more than half the members of the Assembly has expressed in the petition that they no longer had the confidence in Datuk Pairin as the Chief Minister. On the second, no doubt the measurement in Nigeria was a measure of "support", not of "confidence" but for the reason given earlier in this judgment, to my mind the effect is the same. In any event, the view of his Lordship is that the "confidence" of a majority of members may (and not shall) imply reference to a vote such as a vote of confidence or a vote on a major issue. In that light circumstances may arise that in a given situation the evidence of the ceasing to command the confidence of a majority may be available from other sources to which it could indicate what action the members has decided to take when if called upon to vote in the Assembly. In this case, from the petition, the 30 members not only say that they no longer had the confidence in Datuk Pairin as the Chief Minister but they also requested the 1st defendant to convene the Assembly and to direct Datuk Pairin to table a motion of confidence. However, the Assembly was not convened to enable the action to be taken. In addition to that Datuk Pairin himself in his press statement stated that he resigned because the ruling party, i.e. PBS of which he is the leader, no longer has the majority support of the Assemblymen for owing to the defection of the members of his party the position is reversed with the BN having the majority, and thus paving the way for the BN to form the next government. The third and the fifth features and circumstances mentioned by his Lordship do not arise in this case. On the fourth feature and circumstance, no doubt the Nigerian case concerns the subjective decision of the Governor but the Nigerian case before the Privy Council concerns the meaning to be given to the expression "Premier no longer commands the support of a majority of the members" as mentioned by Viscount Radcliffe at page 70. In the Sabah Constitution the expression 'to command the confidence of a majority of the members of the Assembly" appears in Article 6(3) and Article 7(1). Article 6(3) concerns the subjective decision of the Yang di-Pertua Negeri just as s. 33(10) of the Constitution of Western Nigeria concerns the subjective decision of the Governor, but what we are concerned now is with the meaning to be given to the expression "to command the confidence of a majority of the members of the Assembly". A different meaning cannot be given to the same expression appearing in Article 6(3) and Article 7(1) of the Sabah Constitution. In my view, one involves the state of mind of the lead of State - Article 6(3), and the other involves the state of mind of the Chief Minister - Article 7(1), but in as far as the meaning to

be given to the said expression in Articles 6 and 7 that expression must bear the same meaning. In my view, for the reason I gave earlier in this judgment, a vote in the Assembly is not the only means to determine the confidence but depending on the circumstances. A situation may arise where other extraneous matter or material may provide sufficient evidence to establish that fact of the Chief Minister ceasing to command the confidence of a majority of the members of the Assembly for purpose of Article 7(1) of the Constitution. As in this case, there is this evidence of the petition sent to the 1st defendant by 30 members on 16 March 1994 who claim to belong to the BN expressing no confidence in Datuk Pairin as the Chief Minister corroborated by the evidence of Datuk Pairin himself in his press statement prepared soon after seeing the images of the petition over the television, followed by his resignation the next day and the reading and distributing of the press statement at about 2.00 p.m. on 17 March 1994 and reaffirmed by his "explanation" which appeared in the Borneo Mail of 11 May 1994 (Exhibit "SS-12"). In the circumstances *Stephen Kalong Ningkan* case (*supra*) must be distinguished, being a decision based on its own facts and circumstances. The hard fact in that case was the alleged loss of confidence was highly suspect . There was a top secret representation made by persons outside the Council Negeri which on the face of it did not disclose that the representors were the majority of members in the Council Negeri. Also, the fact represented was suspicious in the sense that the letter was not signed by all the persons listed in the letter and even in respect of those who signed, one of them was represented only by a 'chop'. It is for that reason the learned Judge said at page 193: "Men who put their names to a "Top Secret" letter may well hesitate to vote publicly in support of their private view. It is also disclosed in the report of the case that on 14 June 1966, i.e. the date of the letter, when there was a meeting of Council Negeri, bills were passed without opposition despite the presence of 5 members of the Sarawak United Peoples Party and one Machinda member, who normaly behaved as an opposition. Also on that day, there was no motion of confidence put in Council Negeri nor has there been any defeat of a Government bill. Whereas in this case the fact that 30 members against the PBS's 18 elected members expressing their non-confidence in the Chief Minister would clearly indicate mathematically beyond question that the BN was in the majority and these majority had ceased to have their confidence in him. Also, in *Stephen Kalong Ningkan* case (*supra*), the Governor acted to dismiss the Chief Minister even though the latter did not refuse to resign provided he is satisfied that the majority in the Council Negeri ceased to have confidence in him and for that he had requested the Governor to convene the Council Negeri to have the issue tested. This was never acceded to but instead the Chief Minister and the members of his Cabinet were declared by the Governor to have ceased to hold office with immediate effect and proceeded to appoint a new Chief Minister. Whereas in the present case, that issue does not arise. The Chief Minister resigns on his own accord and the reason for the resignation was sufficiently given in his press statement and in the "explanation" given to the Borneo Mail on 11 May 1994 giving even his interpretation of the matter. In the circumstances I would adopt the dicta of Viscount Radcliffe who delivered the judgment of the Privy Council in *Adegbenro v. Akintola's* case (*supra*) at page 70 when his Lordship says:

> What, then, is the meaning of the words 'the Premier no longer commands the support of a majority of the members? It has been said, and said truly, that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly unwritten, Constitution of the United Kingdom. It recognises the basic assumption of that Constitution, as it has been developed, that, so long as the elected House of Representatives is in being, a majority of its members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognises also one other principle that has come to be accepted in the United Kingdom: that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would

depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.

It is said, too, that the 'support' that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their Lordships are in agreement. They do not think however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a part or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities in the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordship somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of 'support' is concerned.

Based on what was said by Viscount Radcliffe in the case, the evidence that a Chief Minister ceases to command the confidence of the majority of members of the Assembly for the purpose of Article 7(1) of the Sabah Constitution, may be found from other extraneous sources than to be confined to the votes taken in the Legislative Assembly provided that, that extraneous sources are properly established. In this case, that extraneous source is to be found in the clear expression contained in the petition by the 30 members to the 1st defendant and the admission of that fact by Datuk Pairin. This clear expression suffices for the 1st defendant to exercise his discretion under Article 6(3) to appoint the 2nd defendant as the new Chief Minister to replace Datuk Pairin which issue in any event is not contested by the plaintiff. The expression of lost of confidence is not, therefore, confined to a vote taken in the Assembly but depending on the circumstances, which are capable of contributing sufficient evidence to indicate such lack of confidence. After all there is nothing in the Constitution of Sabah which can be construed as requiring that the test of confidence or the lack of it must be by way of a vote taken in the Assembly itself. If it is the intention of the framers of the Constitution that it be so then an express provision to that effect would have been so provided. In this case there is no reason at all for Datuk Pairin to have willingly tendered his resignation as the Chief Minister if he honestly believed that he still retained the confidence of the majority of the members of the Assembly. So, in the circumstances, I am of the view which I hold that the resignation of Datuk Pairin on 17 March 1994 was in fact a resignation of the whole members of his Cabinet, including the plaintiff, on account of him ceasing to command the confidence of a majority of the Legislative Assembly as envisaged by Article 7(1) of the Constitution notwithstanding that the letter of resignation was silent as to the resignation of the other members of his Cabinet including the plaintiff. Consequently, on the acceptance of the resignation by the 1st defendant, the whole Cabinet of Datuk Pairin collapsed. There is no longer the necessity for the 1st defendant at any time after that to revoke the appointments of the other members of Datuk Pairin's Cabinet in order to dissolve the Cabinet of which he was the leader.

There is in fact another matter which arose out of the submission of the learned Counsel for the plaintiff which is not really relevant in the light of what I held earlier. For completeness, I will mention it here. The learned Counsel submits that in order that the appointment of the 3rd to the 9th defendants on 24 March 1994 to be legal and constitutional, the 1st defendant must first revoke the appointment of the other members of Datuk Pairin's cabinet. In order to do that the 2nd defendant, the new Chief Minister, ought to have advised the 1st defendant, which he never did. Under Article 7(2) the Yang di-Pertua Negeri may revoke the appointment of a member of the Cabinet other than the Chief Minister acting in accordance with the advice of the Chief Minister. In the light of my decision above, this issue would no longer arise. However, if there need to be

a revocation of the appointment at all under this Clause, it is my view that the Chief Minister to tender the advice to the Yang di-Pertua Negeri must be the Chief Minister of the Cabinet of which these other members are appointed as such, for it was this Chief Minister who brought those members into his Cabinet pursuant to Article 6 of the Constitution. If this Chief Minister himself has ceased to hold office, then the new Chief Minister has no power to advice the Yang di-Pertua Negeri for their removal unless before the intended advice, those members were reappointed as members in the Cabinet of this new Chief Minister whereby pursuant to the reappointment, those members have become the members of his Cabinet. This is simply because those members are not members of the Cabinet in being for the lack of reappointment of them into this Cabinet. On the question of the need for appointment of members of the previous Cabinet into the new Cabinet upon the resignation of a Chief Minister so as to enable the previous members to remain as members of the Cabinet, the matter is not something new in Sabah. According to the evidence in affidavit in reply no. 3 of the defendants when Dato Peter Lo Su Yin was appointed the Chief Minister on 1 January 1965 upon the resignation of the then Chief Minister, Dato Donald Stephens, the members of the whole Cabinet had to be reappointed by the Yang di-Pertua Negeri in accordance with the advice of Dato Peter Lo Su Yin. Exhibit "SS-15" is State of Sabah Government Gazette dated 15 January 1965, notification no. 47. Again, when Tun Datuk Haji Mohd. Fuad Stephens together with three of his Cabinet Ministers died in a plane crash on 6 June 1967, Datuk Harris bin Mohd. Salleh was appointed and sworn in as the new Chief Minister on the same day. The remaining four Ministers of the previous Cabinet were reappointed and sworn in on 9 June 1976. Exhibits "SS-16", "SS-17", "SS-18", "SS-19" and "SS-20" are copies of their oaths of office. On both the occasions, there was neither resignation of the incumbent Ministers nor revocations of their appointment by the Yang di-Pertua Negeri before their reappointments into the new Cabinet. Secondly, according to the evidence in affidavit in reply no. 4 of the defendants, the deponent was once appointed to be a member of the Cabinet of the Chief Minister, Dato' Donald Stephens. Exhibit "TYT-1" is the Gazette notification of the appointment. When Dato' Donald Stephens tendered his resignation as the Chief Minister, he did not tender the resignation of the members of his Cabinet and there was also no revocation of their appointments as members of the Cabinet. The deponent himself did not tender his resignation as a member of the Cabinet. When Dato' Peter Lo Su Yin took over as the Chief Minister, on his advice, the other members of the previous Cabinet were reappointed into this new Cabinet. Exhibit "TYT-2" is the gazette notification. However, the Learned Counsel for the plaintiff argues that the fact that they were reappointed into the new Cabinet without their previous appointments revoked or they themselves tendered their resignation goes to show that they never ceased to be members of the Cabinet. I find that it is very difficult to follow this line of argument because if it were so, why the need to be reappointed? The purpose for the reappointment into a new Cabinet is that had it not been for that fact they would not be members of the Cabinet because by the dissolution of the previous Cabinet they were deemed to have vacated their offices. So, we see that apart from the constitutional provisions, it is a well-established convention and usage in Sabah that upon the death or resignation of the Chief Minister, the Cabinet stands dissolved, the appointments of all its members were deemed to have been vacated, and if any of those members were to continue to be in the new Cabinet they have to be reappointed upon the advice of the new Chief Minister.

A Cabinet is a body constituted for the purpose of advising the Head of State in the exercise of his executive functions except for that which the Constitution reserved it for the Head of State personally to exercise in accordance with his personal discretion. The Cabinet is to consist of a Chief Minister and certain other members to be appointed in accordance with Article 6(3) of the Constitution, i.e. in accordance with the advice of the Chief Minister. Members of a Cabinet

function as a team and as spelt out in Article 6(6) they are collectively responsible to the Legislative Assembly. Persons outside this constituted Cabinet are not members of this Cabinet even though they were in the previous Cabinet which is no longer in being. Those members cannot be in this newly constituted Cabinet unless they are reappointed into it on the advice of the Chief Minister who will be the head of this newly constituted Cabinet. By logic, the new Chief Minister will advice the appointment of a member whom he believes could work smoothly with him in the Cabinet so that in that sense that Cabinet could truly be collectively responsible to the Legislative Assembly. So, how is this new Chief Minister to advice on the revocation of the appointment of those members from the previous Cabinet? To require him to do so, is a fetter on his discretion to advice the Head of State as to the choice of the members to be with him in his Cabinet. The Cabinet as provided in the Constitution is not in being like an ordinary government department manned by public servants, where the servants come and go yet the department remains. In the circumstances the submission so made lacks any merit.

Therefore, in the light of the evidence before me I am of the view and I so hold that notwithstanding the content of the resignation letter, the resignation of Datuk Pairin on 17 March 1994 is a resignation of his cabinet pursuant to article 7(1) of the Sabah Constitution. My view is fortified further by the "explanation" made by Datuk Pairin to the press as contained in exhibit "SS-12" to the affidavit in reply no. 1 of the defendants which clearly indicates the intention of Datuk Pairin in tendering the said letter of resignation to the 1st defendant. *Inter alia*, he was quoted to have said and was never denied, as follows:

> The act of tendering my resignation may have been interpreted to have meant that the whole Cabinet must resign. That was my interpretation and that of some others too but many others interpreted it in a different light.

To summarise, for the reasons given above, it is my judgment that the evidence to establish that a Chief Minister ceases to command the confidence of a majority of the members of the Assembly for purpose of Article 7(1) of the Sabah Constitution need not necessarily be dependent upon the actual motion to be tabled in the State Legislative Assembly. It may be available from sources outside the Legislative Assembly depending on circumstances of each case. In this case, based on the circumstances presented to it, the Court is satisfied that the resignation of Datuk Pairin as the Chief Minister, on 17 March 1994 is a resignation pursuant to him ceasing to command such a confidence. As a result, upon his resignation being accepted, the Cabinet constituted on 21 February 1994 was dissolved and with it goes the appointments of the other members of that Cabinet, including the plaintiff. Consequently, the appointments of the plaintiff made on 21 February 1994 would not any longer subsist in law. As the Cabinet constituted on 21 February 1994 was dissolved, the appointment of the 2nd defendant as the new Chief Minister by the 1st defendant on 1 7 March 1994 was valid and constitutional. The appointments of the 2nd to the 9th defendants on 24 March 1994 was in accordance with the provisions of Article 6(3) of the Constitution and are therefore, valid. The gap between the dissolution on 17 March 1994 of the Cabinet formed on 21 February 1994, and the formation of a new Cabinet on 24 March 1994 upon the appointments of the 2nd to the 9th defendant on that date is not illegal and unconstitutional. But the learned Counsel for the plaintiff argues that the Yang di-Pertua Negeri must at all times have a Chief Minister and his Cabinet to advise him on the performance of his constitutional function. In support, he cited a passage from **Indian Constitutional Law** by M.P. Jain, 4th Ed. at page 87 concerning the Council of Ministers in India in connection with the provisions of Article 74 of the Indian Constitution. The passage is as follows:

> According to Art. 74(1), there shall be a Council of Ministers with the Prime Minister at its head. The provision is mandatory and at no point of time can the President dispense with this body. The Council of Ministers remains in office even when the Lok Sabha is dissolved. The Supreme Court

> has refused to accept the contention that during the dissolution of the Lok Sabha, the President can rule with the help of advisers. That will change the whole concept of the Executive. Accordingly, 'the President cannot exercise the executive power without the aid and advice of the Council of Ministers.'

There is no dispute about that. Article 74(1) of the Indian Constitution is almost similar to Article 6(1) of the Sabah Constitution. But, as I understand the passage above quoted, it is not intended to mean that there must be at all times a Cabinet in existence, otherwise it would be unconstitutional. What it means is that there must be a Cabinet to advice the Head of State, for the Head of State cannot dispense with this body if he is to exercise his constitutional function. In other words, if no such body in existence, the Head of State is handicapped in exercising his constitutional function. As in our present case, the gap so created by having no Cabinet in existence between 17 March 1994 and 24 March 1994 would merely hamper the exercise of the executive function of the 1st defendant as the executive authority of the State where that function by the Constitution requires the advice of the Cabinet. Upon those findings, the application of the plaintiff by this amended originating summons must necessarily fail and I accordingly dismiss the said application with costs to the defendants to be taxed, unless agreed.